

# GOVERNMENT CONTRACT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 24, ISSUE 9 / SEPTEMBER 3, 2010

## Expert Analysis

### GSA's IT Schedule 70: How to make it worth the effort

*By Jeffrey A. Belkin, Esq., and Steven R. Campbell, Esq.*

The General Services Administration's IT Schedule 70 is a Multiple Award Schedule contract that enables all federal government agencies to directly contract with commercial vendors for information technology products and services.<sup>1</sup> In addition to federal agencies, state and local government entities<sup>2</sup> are eligible to purchase IT products and services from contracts under GSA Schedule 70 pursuant to the E-Government Act of 2002.<sup>3</sup>

With a wide customer base and the ever-growing need for IT products and services, GSA Schedule 70 has become the largest of the agency's schedules by a significant margin.<sup>4</sup> Schedule 70 sales consistently represent more than 40 percent of all GSA schedule sales each year.

During fiscal year 2009, Schedule 70 sales totaled \$15.6 billion, which accounted for about 42 percent of all GSA schedule sales.<sup>5</sup> However, in recent years, Schedule 70 sales have dropped.<sup>6</sup> In fiscal year 2008, Schedule 70 sales totaled \$15.8 billion, which marked a decrease from fiscal year 2007's total of \$16.4 billion.<sup>7</sup>

The recent downward trend in Schedule 70 sales is unlikely to continue in light of efforts by the Office of Management and Budget to consolidate overlapping government agency contracts, as well as the addition of new products and services offered under the schedule.<sup>8</sup> Notwithstanding the recent decline in sales, Schedule 70 offers commercial IT vendors a lucrative opportunity. In 2009 the top Schedule 70 vendor recorded over \$1 billion in sales.<sup>9</sup>

The GSA Schedule 70 is a good first vehicle for the initial entrant into the federal government market. Because all the products and services are commercial items, Part 12 of the Federal Acquisition Regulations ensures that the minimum number of noncommercial contract terms are imposed on the contractor.

On the other hand, the obligations of Schedule 70 require a robust compliance program regardless of the dollar amount of actual sales. This is the case as compared with a company that might make only a handful of sales to government customers on the open market. Thus, the GSA schedule is a good step after a company dips its toes into the federal market, likes the temperature and decides to wade in slowly.

*Schedule 70 sales consistently represent more than 40 percent of all GSA schedule sales each year.*

The process for obtaining a schedule is neither simple nor fast, and this fact actually benefits offerers by ensuring that they will take their time reviewing the terms and conditions of the contract. GSA's contracting officers also do a good job of explaining, in most instances, the process and issues to first-time offerers, particularly to those that have not retained one of the many consultants who act as shepherds through the procurement process.

Nor is a contractor's job complete when it is awarded a schedule. The marketing process has only just begun, and the administrative requirements demand constant vigilance to avoid the traps into which many unwary and cautious contractors alike routinely fall. After discussing the background of GSA's schedule program and the structure of Schedule 70, this article provides some tips for the negotiation phase and identifies some of the stumbling blocks that are routinely faced by contractors.

## BACKGROUND

In the 1950s GSA created the Federal Supply Schedule program, which is commonly referred to as the Multiple Award Schedule.<sup>10</sup> The MAS program serves as the government's most consistent and long-standing vehicle through which commercial supplies and services are purchased.<sup>11</sup> According to the FAR, the FSS:

Provides federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographical area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas.<sup>12</sup>

In short, the MAS program is designed to enable authorized government purchasers "to purchase commercial supplies and services quickly, efficiently and at fair and reasonable prices."<sup>13</sup>

Purchasing supplies and services through the MAS program is attractive to authorized government purchasers because they do not have to issue a request for proposals, conduct a competition or satisfy many other typical federal procurement requirements.<sup>14</sup> Under the MAS program, GSA awards commercial vendors indefinite-delivery/indefinite-quantity contracts to provide over 11 million commercial supplies and services to authorized users.<sup>15</sup>

For any given item, GSA awards multiple contracts. MAS contracts are typically 20-year contracts that have a five-year base period with three five-year option periods. Contractors pay to GSA 0.75 percent of each order under the schedule, called the industrial funding fee, which compensates GSA for the cost of running the schedule.<sup>16</sup>

Because GSA schedule contracts include pre-negotiated prices, products are offered at fixed prices and services are offered at either a fixed price per task or an hourly rate.<sup>17</sup> Once GSA issues an MAS contract, the buying agencies order directly from the commercial vendor with a pre-negotiated set of terms and conditions, which the purchasing agencies may add to or modify. MAS program purchasers select products and services based on "best value." The FAR define "best value" as the expected outcome of an acquisition that provides the greatest overall benefit in response to the requirement.<sup>18</sup>

GSA provides an online shopping service called GSA Advantage that enables authorized purchasers to search product information, review delivery options and

### Schedule 70 special item numbers

132-3	Leasing of Products
132-4	Daily/Short Term Rental
132-8	Purchase of New Equipment
132-9	Purchase of Used or Refurbished Equipment
132-12	Maintenance of Equipment, Repair Services and/or Repair/Spare Parts
132-32	Term Software License
132-33	Perpetual Software License
132-34	Maintenance of Software as a Service
132-50	Training Courses
132-51	Information Technology Professional Services
132-52	Electronic Commerce Services
132-53	Wireless Services
132-60A	Electronic Credentials, Not Identity Proofed
132-60B	Electronic Credentials, Identity Proofed
132-60C	Digital Certifications, Including ACES
132-60DE	authentication Hardware Tokens
132-60E	Remote Identity and Access managed Service Offering
132-60F	Identity and Access Management Professional Services
132-61	Public Key Infrastructure Shared Services Provider Program
132-62	HSPD-12 Product and Service Components

*The GSA Schedule 70 is a good first vehicle for the initial entrant into the federal government market.*

place schedule orders.<sup>19</sup> GSA's electronic request-for-quotation system is "e-Buy."<sup>20</sup> Through e-Buy, authorized purchasers post requirements, obtain quotes and issue electronic orders.<sup>21</sup>

Products and services are organized under each GSA schedule by special item number. Schedule 70 currently has 20 SINs (see box):

In addition two new SINs will be added to Schedule 70 in the near future.<sup>22</sup> The new SINs are part of the GSA and Defense Information System Agency's Future Comstatcom Services Acquisition Program and are expected to result in over \$5 billion in sales.<sup>23</sup> According to GSA, the new SINs will be:

- 132-54 Commercial Satellite Communications Transponded Capacity
- 132-55 Commercial Satellite Communications Subscription Services.<sup>24</sup>

*The Multiple Award Schedule program is the government's most consistent and long-standing vehicle through which commercial supplies and services are purchased.*

### GETTING A PLACE AT THE TABLE

The MAS program is open to all "responsible" offerers. According to the FAR, a "responsible" prospective contractor must:

- Have adequate financial resources to perform the contract or the ability to obtain them.
- Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- Have a satisfactory performance record.
- Have a satisfactory record of integrity and business ethics.
- Have the necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain them.
- Have the necessary production, construction, and technical equipment and facilities or the ability to obtain them.
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations<sup>25</sup>

To become a Schedule 70 vendor, a prospective seller must submit a Schedule 70 proposal. Completing the Schedule 70 proposal, which is over 300 pages, is an involved process that requires a prospective vendor to conduct thorough internal due diligence. Prospective vendors should expect completion of a proposal to take at least six weeks and much longer for more involved proposals.<sup>26</sup> GSA will typically make a decision within three to six months after a proposal is submitted.<sup>27</sup>

A prospective vendor must take many important considerations into account, such as whether the particular item he or she wishes to sell complies with the Trade Agreement Act (currently a hot topic of oversight and enforcement). Perhaps the most important consideration, however, concerns a prospective vendor's pricing disclosures.

### OVERSIGHT ISSUES

GSA schedule contracts are negotiated with the intent of achieving the vendor's "most favored customer" pricing, discounts and concessions. The GSA acquisition manual provides, "The government will seek to obtain the offerer's best price (the best price given to the most favored customer)."<sup>28</sup>

Notwithstanding GSA's intent to obtain "most favored customer" pricing, discounts and concessions, there is no requirement that the prospective vendor actually offer the government its best, or most favored customer, price.<sup>29</sup> In fact, the law merely requires the government to obtain a "fair and reasonable" price under the circumstances.<sup>30</sup> To ensure that government entities achieve the best price, GSA requires full disclosure of this information at the time of solicitation.<sup>31</sup>

GSA pricing for MAS program contracts is based on the following: commercial price list, "most favored customer" price for a given customer or category of customers, and MAS contract price. Through the price reductions clause of the MAS contract, GSA ensures that these three prices remain consistent. Because MAS contracts typically last for 20 years, a prospective vendor should view pricing as a continuous process.<sup>32</sup>

A prospective vendor's commercial sales numbers and discounting practices form the backdrop for price negotiations with GSA. To ensure that government entities achieve "fair and reasonable" prices, GSA requests this information at the time of solicitation in the commercial sales practices format.<sup>33</sup> A prospective vendor must complete a CSP format chart for each SIN corresponding to the items or services it wishes to sell.<sup>34</sup>

Unless the prospective vendor is offering the government its best price or lower, it must prepare the CSP format chart for *all* customers/category of customers that receive the same or better pricing based on contracts in effect at the time of the offer or contracts that will become effective during the period of the Schedule 70 contract.<sup>35</sup> The CSP format chart requires a prospective vendor to list the following information:

- Customer or category of customers.
- Best discount provided to the customer or category of customers.
- Quality/volume of sales corresponding to each customer or category of customers.
- Delivery terms corresponding to each customer or category of customers.
- Concessions corresponding to each customer or category of customers.
- Deviations arising from discounts and/or concessions.<sup>36</sup>

One favorable term for the government under the GSA schedule is that the United States cannot be charged shipping for ordinary delivery, and shipping cost cannot be used to demonstrate the favorability of the pricing offered to the government. Once that information is provided, it is then up to the vendor to convince GSA that certain categories of customers, or even certain specific transactions, should or should not be the baseline for the government's pricing, because of different circumstances in those transactions. The final negotiation is reflected in a "basis of award" letter, which reflects an agreed customer or category of customers against which the government's price must be continuously monitored.

Failure to maintain a favorable pricing relationship may result in a price reduction. The reduction is triggered by the price reductions clause. Failure to have provided fully responsive information at the disclosure stage may result in a far greater risk: a defective-pricing claim. In such a claim the government takes the position that a history of sales would have been at a lower price had the vendor revealed certain transactions or customers that were omitted from the original disclosure. This is the most substantial risk to vendors under the GSA schedule.

A prospective vendor's failure to provide full and accurate pricing and/or discount information can lead to liability under the False Claims Act.<sup>37</sup> Traditional sources of FCA defective-pricing claims include not only *qui tam* "whistle-blower" suits, but also routine and non-routine government audits.

For example, the GSA obligates contractors to undergo a routine audit of their tracking and payment of the industrial funding fee, which is self-paid every quarter. About every two years a contractor receives an announcement that an industrial operations analyst will be visiting to conduct an IFF audit. Yet contractors should be wary that that audit is anything but limited to tracking and auditing IFF payments. IOA reviews routinely result in amounts claimed by GSA to be owed for IFF, most often because the auditor finds "open market" transactions that the government contends should

***Prospective vendors should expect completion of a Schedule 70 proposal to take at least six weeks.***

*There is no requirement that the prospective vendor actually offer the government its best price.*

have been sales under its schedule (either based upon the price charged or indications in the order documentation).

This negotiation, often over a mere few thousand dollars, is frequently further complicated by the fact that the IOA has also identified transactions that the auditor contends should have been priced differently or non-federal sales that should have triggered a price reduction for the government. Thus, "routine" IOA audits are anything but routine and can result in a defective-pricing claim.

GSA also has the authority to conduct both pre-award and post-award audits. Conceptually, pre-award audits would serve both contractors and GSA as they would identify issues in pricing disclosures prior to the creation of the basis-of-award letter and the award of the contract. In practice, however, pre-award audits are uncommon.

Instead, GSA often relies upon post-award audits to detect pricing issues. Unfortunately for most contractors, the post-award audit is rarely conducted immediately after the contract award. Instead, the post-award audit is most often performed at the very end of a contract term, or even after a contract has ended. Many contractors have been in the position of defending pricing disclosures and dredging up commercial pricing practices five or 10 years after the award of the contract. Contractors should take care to maintain negotiation records, including notes of telephone calls with contracting officers and copies of all data reviewed and exchanged with GSA.

## CONCLUSION

Obtaining a GSA Schedule 70 contract is an important step in a contractor's expansion of sales into the federal market. The Schedule 70 is the most popular government-wide contracting vehicle and is the most accessible to new entrants to the market.

It is time-consuming to obtain the contract, and therefore only committed vendors should initiate the process. More importantly, constant vigilance to the pricing disclosure obligations prior to award, and to pricing and other compliance obligations post-award, is necessary to ensure that the GSA schedule does not become a burden and present an undue risk of financial penalties.

## NOTES

<sup>1</sup> See <http://www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do;jsessionid=9D79681668149A04286DED05DC912A71.node1?scheduleNumber=70>.

<sup>2</sup> "State and local government" is broad and includes the states of the United States, counties municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges and other institutions of higher learning, council of governments (incorporated or not), regional or interstate government entities, or an agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments. See GSA Schedule 70 Solicitation, solicitation no. FCIS-JB-980001-B, cover page, part 11.

<sup>3</sup> See Section 211 of the E-Government Act of 2002 which amended the Federal Property and Administrative Services Act.

<sup>4</sup> See Dan Davidson, *GSA schedule sales slump*, FED. TIMES, May 5, 2010, available at <http://www.federaltimes.com/article/20100505/ACQUISITION01/5050303/>.

<sup>5</sup> See [http://militarytimes.com/static/projects/pages/ft050510\\_TopSelling.pdf](http://militarytimes.com/static/projects/pages/ft050510_TopSelling.pdf).

<sup>6</sup> *Id.* See also Dan Davidson, *GSA looks to raise IT sales*, FED. TIMES, June 9, 2009, available at <http://www.federaltimes.com/article/20090609/DEPARTMENTS07/906090304/0/RSS>.

<sup>7</sup> *Id.* According to a source quoted in the militarytimes.com article, the dip in sales is likely attributable, at least in part, to the Department of Defense's generic IT contracts. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See <http://www.capitalreps.com/Capital%20Reps%20Top%20100%20GSA%20Schedule%2070%20Holders.pdf>.

- <sup>10</sup> See <http://oig.gsa.gov/auditreports/reports/a000897.pdf>.
- <sup>11</sup> See <http://www.gsa.gov/portal/content/104447>.
- <sup>12</sup> FAR 38.101(a).
- <sup>13</sup> GSA Schedule 70 Solicitation, solicitation no. FCIS-JB-980001-B, introduction to prospective offerers.
- <sup>14</sup> See FAR 8.404(a).
- <sup>15</sup> FAR 8.402(a).
- <sup>16</sup> GSAR 552.238-74(b).
- <sup>17</sup> FAR 8.404(d).
- <sup>18</sup> FAR 2.101.
- <sup>19</sup> FAR 8.402(c).
- <sup>20</sup> FAR 8.402(d).
- <sup>21</sup> *Id.*
- <sup>22</sup> See <http://www.gsa.gov/portal/content/104506>.
- <sup>23</sup> See Sami Lais, *Potential FCSA bidders question size, scope and procurement model*, WASH. TECH., May 3, 2010, available at <http://washingtontechnology.com/articles/2010/05/03/strategy-satellite-gsa-dod.aspx>.
- <sup>24</sup> See note 22.
- <sup>25</sup> FAR 9.104-1.
- <sup>26</sup> See Scott Orbach & Judith Nelson, *Getting a GSA Schedule: At Step by Step Guide*, 1 (EZGSA Publications 2006).
- <sup>27</sup> GSA Schedule 70 Solicitation, solicitation no. FCIS-JB-980001-B, introduction to prospective offerers.
- <sup>28</sup> GSAR 538.270(a).
- <sup>29</sup> *Id.*
- <sup>30</sup> FAR 8.404(d).
- <sup>31</sup> GSAM 515.408.
- <sup>32</sup> John W. Chierichella & Jonathon S. Arone, *Multiple Award Schedule Contracting* 142, Library of Congress No. 2002090265 (2002).
- <sup>33</sup> GSAM 515.408.
- <sup>34</sup> GSA Schedule 70 Solicitation, solicitation no. FCIS-JB-980001-B, CSP-1.
- <sup>35</sup> *Id.*
- <sup>36</sup> GSA Schedule 70 Solicitation, solicitation no. FCIS-JB-980001-B, CSP-1.
- <sup>37</sup> 31 U.S.C. §§ 3729-3733.



**Jeffrey A. Belkin** (left) is a partner at **Alston & Bird** in Atlanta and Washington, where he leads the firm's government contracts practice. **Steven R. Campbell** (right) is an associate in the firm's Atlanta office, where he is a member of the construction and government contracts group.

©2010 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [www.West.Thomson.com](http://www.West.Thomson.com).